Boydston Electric, Inc. *and* International Brotherhood of Electrical Workers, Local 611, AFL–CIO. Case 28–CA–13447

August 25, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On April 10, 1998, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The General Counsel filed exceptions and a supporting brief and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.[2]

The Respondent is an electrical contractor that began work at the Cottonwood Mall in Albuquerque, New Mexico, in May 1995.[3] In June, union members applied for employment with the Respondent, with some obtaining work and others not. Several employees engaged in union activity, including the circulation of union cards and information, that culminated in a strike on September 25.

The judge found that the Respondent violated Section 8(a)(1) of the Act by threatening an employee, Dan Miano, with termination for soliciting for the Union on nonworking time and by asking another employee, Larry Chavez, whether he had signed a union card and by creating the impression that it was engaged in surveillance of its employees' union and other protected activities by asking Chavez whether he was going to follow in Miano's footsteps.[4] Contrary to the judge, for the reasons set forth below, we also find that the Respondent violated Section 8(a)(1) by interrogating Miano and threatening him with unspecified reprisals for his union activities, and Section 8(a)(3) by discharging him for his union activity. We further find, contrary to the judge, that the employees engaged in an unfair labor practice strike and therefore the Respondent violated Section 8(a)(3) and (1) by failing and refusing to reinstate former striking employees Ray and Shawn Garrett after their unconditional offer to return to work. Finally, we reverse the judge and find that the Respondent violated Section 8(a)(3) and (1) by failing to hire job applicants Lloyd and Rita Beebe because of their union affiliation.[5]

The Threat and Interrogation of Miano

On September 19, Miano passed out union cards to employees before work. As the judge found, shortly after Miano did this, Joe Jaramillo, the field foreman and superintendent, asked Miano why he was doing "this" and told him that he was not doing himself or the other employees any good. Jaramillo added that the Respondent was nonunion, the job was bid nonunion, and it would probably stay that way. Jaramillo also added that he would do everything he could to protect his men. In finding Jaramillo's comments lawful, the judge noted that Miano and Jaramillo were friends.

We find that Jaramillo unlawfully threatened Miano. Jaramillo's statements, in quick response and clear reference to Miano's distribution of union authorization cards, reasonably implied that Miano's protected activities might harm his interests, and thus would have reasonably caused him to fear reprisals for engaging in such protected activities. See *Long Island College Hospital*, 327 NLRB 944 (1999) (advising employees to "proceed with caution" unlawful); and *Liberty Natural Products*, 314 NLRB 630 (1994) (employer's statement that employees who signed a protest petition were stupid and that they should have known better found unlawful), enfd. mem. 73 F.3d 369 (9th Cir. 1995). The fact that Miano and Jaramillo were friends does not negate the coercive impact of Jaramillo's statements. In fact, such advice, "had it come from a friend sincerely concerned for the employee's job security, might have been all the more ominous." *Jordan Marsh Stores Corp*., 317 NLRB 460, 462–463 (1995). See also *Olney IGA Foodliner*, 286 NLRB 741, 748 (1987), enfd. 870 F.2d 1279 (7th Cir. 1989) (threats possibly intended as "friendly advice" found violative).[6]

We further find that Jaramillo's asking Miano why he was distributing union authorization cards, in the context of unlawfully threatening him with unspecified reprisals for doing so, constituted coercive interrogation, in violation of Section 8(a)(1) of the Act.

[1] We deny the General Counsel's motion to amend the complaint to allege that the Respondent discriminatorily promulgated its no-distribution rule.

[2] We correct the Order and notice to conform to the violations found.

[3] Unless noted otherwise, all dates are in 1995.

[4] There are no exceptions to these findings.

[5] In the circumstances of this case, we adopt the judge's finding that the Respondent did not unlawfully interrogate employee Donald Martin. We note that the Board normally finds the interrogation of an applicant during an interview to be inherently coercive. See, e.g., *Culley Mechanical Co.*, 316 NLRB 26, 27 fn. 8 (1995). However, in this case, Martin, in his own words, "tried to be as obvious as possible" in showing his support for the Union when applying for the job by wearing a union shirt, hat, and pencil clip and the Respondent's representative simply asked him how long he had been in the Union. Thus, noting the open advocacy of the applicant and the nature of the question asked, we do not find this a coercive interrogation under Sec. 8(a)(1). We also adopt the judge's finding that the Respondent did not violate Sec. 8(a)(3) and (1) by discharging Vince Sisneros.

[6] Thus, we reject our dissenting colleague's attempt to discount Jaramillo's threat as no more than an amicably offered personal opinion about the practical difficulties faced by employees who seek union representation on a job that was bid as nonunion. Jaramillo's remarks to Miano are clearly far more than that, and our colleague's benign characterization of them is simply not supported by the record.

The Discharge of Miano

Contrary to the judge, we find that the Respondent violated Section 8(a)(3) of the Act by discharging Miano for engaging in union activity. The facts are as follows. On September 19, Project Manager Dave Akin told Miano not to pass out union literature at the jobsite on company time, and, on September 20, suspended Miano for his distribution of union flyers on that day on working time. Following the suspension, Keith Boydston, the Respondent's president, instructed Akin to examine Miano's application. Upon reading it, Akin noticed that Miano had listed "self employed" for prior employment. On September 22, Akin asked Miano where he had worked while self-employed. Miano answered that he had worked on various "side jobs."[7] Akin told Miano that he needed to know the people he had worked for and their phone numbers while he was self-employed, and told Miano that he could not come back to work unless he gave Akin that information. Although Miano took the application with him, he did not provide any information in response to Akin's demand, and thus he did not return to work.

The judge found that the General Counsel established that union activity was a motivating factor in Miano's September 20 suspension but that the Respondent would have suspended Miano in any event because he openly violated its rule against circulating union literature at the workplace on working time.[8] With regard to the allegation that the Respondent unlawfully discharged Miano on September 22, it is undisputed that Miano's distribution of union literature was a motivating factor in the Respondent's examination of his employment application—motivation which the judge found to be unlawful.[9] Further, the Respondent admitted in its answer to the complaint that it discharged Miano "on or about September 22," and that since that date it has failed and refused to reinstate him. Notwithstanding the Respondent's admission of discharge, however, the judge found that Miano had not in fact been discharged, because he did not return with a completed application. She concluded that it "would be unjust to find discharge based on the answer when the evidence is to the contrary."

Contrary to the judge, we find that the Respondent's admission in its answer that it discharged Miano on or about September 22 is binding. In a similar circumstance, the Board has held that "[s]uch an admission has the effect of a confessory pleading, and its principal characteristic is that it is conclusive upon the party making it." *Academy of Art College*, 241 NLRB 454, 455 (1979), enfd. 620 F.2d 720 (9th Cir. 1980) (citations omitted) (various stipulations, once entered into evidence, constituted judicial admission on the respondent's part as to the facts contained therein). The judges, the Board, and the parties rely on the complaints and the answers to determine the contested issues. See *Liberty Natural Products*, 314 NLRB 630 (1994), enfd. mem. 73 F.3d 369 (9th Cir. 1995), cert. denied 518 U.S. 1007 (1996) (where answer admits complaint allegation that individual is a supervisor, General Counsel can rely on admission and does not need to litigate that issue); *United Steelworkers Local 14534 v. NLRB*, 983 F.2d 240, 247 (D.C. Cir. 1993) (where answer admits complaint allegation that striking employees, through the Union, made a written unconditional offer to employer to return to work, employer took that issue out of the case).

We also find that the Respondent's introduction of evidence potentially in conflict with its admission does not negate the binding effect of the admission. Similarly, courts have repeatedly held that admissions contained in pleadings are binding even where the admitting party later produces contrary evidence. E.g., *Missouri Housing Development v. Brice*, 919 F.2d 1306, 1314–1315 (8th Cir. 1990), citing, inter alia, *Davis v. A. G. Edwards & Sons, Inc.*, 823 F.2d 105 (5th Cir. 1987) (even if post-pleading evidence conflicts with admissions in the pleadings, admissions in the pleadings are binding on the parties and may support summary judgment against the party making such admissions). In addition, the Respondent provides no reason why it did not deny in its answer the allegation that it discharged Miano on or about September 22. Cf. *K&W Trucking, Inc*., 215 NLRB 127 (1974) (Board rejected a respondent's reconsideration motion based, inter alia, on the employer's assertion that its attorney was under a mistaken impression that it was engaged in interstate commerce). Accordingly, we find that the Respondent is bound by its admission that it discharged Miano on or about the day the Respondent questioned him about his application. Consequently, it is unnecessary for us to address our dissenting colleague's argument that it would not have been reasonable for Miano to believe that he was discharged. The discharge of Miano became and remained an admitted fact in this proceeding from the time that the Respondent admitted in its answer that it discharged him.

We further find that the General Counsel has met his burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Manage-*

[7] Miano admitted at the hearing that he had submitted an inaccurate application, testifying that he had not included the union contractors for whom he had worked. The evidence reflects that Shawn Garrett, another employee, had similarly listed "self employed, motel maintenance" on his application but there is no evidence that he was questioned about it.

[8] We adopt the judge's finding that the Respondent did not violate Sec. 8(a)(3) by suspending Miano.

[9] Indeed, the record establishes that Miano's distribution of union literature was *the only* motivating factor in the Respondent's examination of his employment application. Thus, when questioned about the reason for examining Miano's application, Project Manager Akin explained "[I]t was after he was handing out fliers that we had taken a closer look at it."

ment Corp., 462 U.S. 393, 399–403 (1983), by providing sufficient evidence supporting an inference that protected activity was a motivating factor in the Respondent's decision to discharge Miano. Miano engaged in open union activity, the Respondent unlawfully questioned and threatened him in response to this activity, it discharged him 3 days after the activity, and it showed its union animus through other unlawful conduct. In agreement with the judge, we also find that a motivating factor in the Respondent's examination of Miano's application was his distribution of union literature.

We find that the Respondent has not met its burden of rebutting the General Counsel's case by showing that it would have discharged Miano in the absence of protected conduct. The Respondent searched for a reason to discharge Miano for his union activity immediately after it found out about it, and found one in his application.[10] The evidence does not reflect that the Respondent had any other reason for its reconsideration of the application. If Miano had not engaged in union activity, the Respondent would not have reviewed his application and discharged him. Accordingly, we find that the Respondent violated Section 8(a)(3) and (1) by discharging Miano.

The Alleged Unfair Labor Practice Strike and Failure to Reinstate Strikers

We also find, contrary to the judge, that the Respondent's employees engaged in an unfair labor practice strike. On September 22, Ray Garrett, Shawn Garrett, Miano, and two other employees met with Brian Condit, a union representative, and discussed the various unfair labor practices which they believed had occurred, including the discharge of Miano, interrogations, threats, and the selective enforcement of solicitation rules. On Monday, September 25, Ray and Shawn Garrett and the other employees went to the jobsite, announced that they were striking and soon departed. On February 28, 1996, Ray and Shawn Garrett unconditionally offered to return to work immediately. Akin told them that he did not need any electricians at that time.

Under settled principles, a strike is an unfair labor practice strike where the employer's unfair labor practice conduct constitutes one of the causes of a strike. E.g., *Trumbull Memorial Hospital,* 288 NLRB 1429, 1449 (1988). Here, the judge applied an incorrect test when she found that the strike was not an unfair labor practice strike because, inter alia, the unfair labor practices which caused the strike were not "flagrant or of a serious, pervasive nature." Although flagrant, serious, or pervasive unfair labor practices may certainly cause an unfair labor practice strike, and may even be *more likely* to cause one, they are nevertheless, in the final analysis, not *necessary* conditions to finding that there was an unfair labor practice strike. In determining whether a strike is an unfair labor practice strike, the Board does not calculate the relative severity of the unfair labor practices, but instead considers only whether the strike was at least in part the direct result of the employer's unfair labor practices, *C&E Stores*, 221 NLRB 1321, 1322 (1976); and whether the employer's unlawful conduct played a part in the decision to strike, *Central Management Co.*, 314 NLRB 763, 768 (1994).

Indeed, *Citizens National Bank of Wilmar*,[11] cited by the judge, sets forth the correct test, in clear terms and fails to support the proposition for which it is cited by the judge. Thus, in *Citizens National Bank of Wilmar*, the Board stated:

> [T]he correct standard in determining whether a strike is an unfair labor practice strike is whether it is one which is caused "in whole or in part" by an unfair labor practice. [245 NLRB at 391; citations omitted].

The Board in *Citizens National Bank of Wilmar* did not mention, much less assess, the relative gravity or extent of unfair labor practices in determining whether there was an unfair labor practice strike. Nor do the facts in *Citizens National Bank* support a proposition that such an assessment is necessary in determining whether a strike is an unfair labor practice strike. Rather, the crucial factor in finding that the strike in *Citizens National Bank* was not an unfair labor practice strike was that, at the strike vote meeting, the employees expressed no concern over the sole unfair labor practice committed by the employer, which had occurred five months before the meeting.

In this case, the judge found that the Respondent violated Section 8(a)(1) by threatening Miano with termination for distributing union literature before work and by asking employee Chavez if he had signed a union authorization card and whether he was walking in Miano's footsteps. In addition, we find that the Respondent further violated Section 8(a)(1) by threatening Miano with unspecified reprisals for his union activity and by interrogating him, and Section 8(a)(3) and (1) by discharging Miano for union activity. We also find that the unfair labor practices were a cause of the strike. Specifically, later in the same day of Miano's discharge, the employees met and discussed the matters we have found to constitute unfair labor practices, including the interrogations, threats, and the discharge of Miano itself. They informed the Respondent that its unfair labor practice conduct was the cause of the strike and went on strike the next business day. See *Walnut Creek Honda*, 316 NLRB 139, 142 (1995), enfd. on other grounds 89 F.3d 645 (9th Cir. 1996) (Board pays special attention to statements made during negotiations and strike vote meetings).

[10] As noted above, at least one other employee listed "self employed" on his application and the Respondent did not question him about it.

[11] 245 NLRB 389, 391 (1979), enfd. mem. 644 F.2d 39 (D.C. Cir. 1981).

Under well-established Board law, an employer is required to reinstate unfair labor practice strikers upon their unconditional offer to return to work. *Mauka, Inc*., 327 NLRB 803 (1999). See also *Detroit Newspapers*, 326 NLRB 700, 766 (1998). In this case, it is uncontested that Ray and Shawn Garrett made an unconditional offer to return to work on February 28, 1996, and were not reinstated. Accordingly, we find that the Respondent violated Section 8(a)(3) by refusing to reinstate them upon their offer to return.

The Failure to Hire Lloyd and Rita Beebe

We further find, contrary to the judge, that the Respondent violated Section 8(a)(3) and (1) by failing and refusing to hire Lloyd and Rita Beebe. The facts are as follows. On June 1 and 2, 1996, the Respondent advertised job openings for journeymen electricians. On June 3, Lloyd and Rita Beebe provided their completed applications for employment to the Respondent. Both wore union hats and T-shirts and brought their young child with them, who was also wearing a union T-shirt. Their completed applications showed that they had graduated from the Union's apprenticeship training program and had worked for union contractors in journeymen electrician positions. They listed union business agents as references, including Union Representative Condit.[12] The record establishes (indeed, the Respondent does not dispute) that the Beebes had experience and training relevant to the Respondent's requirements. Yet neither was hired. On the same day that the Beebes were rejected, however, *covert* union salts Vincent Sisneros, Moran, Beel, and Romano all submitted employment applications and all carefully concealed their union affiliation. They were all hired. The Respondent subsequently hired three other employees in June, within 3 weeks of rejecting the Beebes, including Delano Whitney and Darrell Brooks. Their applications were not shown to have evidenced any union affiliation. Indeed, foreman/superintendent Jaramillo testified that the Respondent did not even have any applications on file for Brooks and Whitney, and that he did not know whether they had even submitted applications. Jaramillo added that he did not recall the circumstances of Brooks' hiring, but that he had hired Whitney, who had previously worked for the Respondent.

Boydston testified that he reviewed the Beebes' applications, noticing that they listed Condit as a reference, that their past employment had been with a union contractor at higher wages, and that they were currently unemployed. Boydston testified that he did not hire Lloyd and Rita Beebe because he did not think that they were "real serious about coming to work for me as a good employee, employees." Boydston testified that he felt that way because they had brought their child with them when they applied for work, they had been working for a "good union contractor" at a higher wage and had quit after a short time there, and their employment record made them look "unstable" because they worked short jobs. Boydston acknowledged, however, in response to the General Counsel's questions, that there are "many, many reasons" why an individual may legitimately wish to leave a higher paying position, including a desire to advance one's career, perform more challenging work, gain better opportunities for promotion, work closer to home or the family's babysitter, or avoid conflicts with supervisors that were not the employee's fault. He also agreed that individuals might do so to organize a union.

With respect to the Respondent's refusal to hire the Beebes, we affirm the judge's finding that the General Counsel met his initial evidentiary burden under *Wright Line*, supra. More specifically, we find that the record establishes that the Respondent was hiring at the time the Beebes applied for employment, that they had experience and training relevant to the generally known requirements of the position for hire (journeyman electrician), and that antiunion animus contributed to the Respondent's decision not to hire them. See *FES,* 331 NLRB No. 20, slip op. at 4. (2000).

As stated, in an effort to establish a *Wright Line* defense, Boydston testified that he did not hire the Beebes because he did not think they were "real serious about coming to work for me as a good employee, employees." He cited their bringing their child with them, and their having worked some short construction jobs, and he said that he was puzzled about the statements on their applications that they had worked for a union-contractor making $18.70 an hour, but were looking for "better employment." He testified that he did not think that "[he would] fill that criteria for them." The judge found that Boydston's testimony "was quite genuine and understandable." As she explained, "[w]ithout more information, it is nonsensical to leave a higher paying employer for better employment and consider lower pay to be that better employment." Under those circumstances, she found that the Respondent has satisfied its *Wright Line* burden to show that the Beebes would not have been hired even if their union affiliation had not been known. Contrary to the judge, we find that the Respondent has not met its *Wright Line* burden.

We accept the judge's finding that one reason Boydston did not hire the Beebes was that he had questions concerning the seriousness of their applications and the reasons for their considering this lower paying jobs better than their former jobs. Unlike the judge, however,

[12] Rita Beebe's application reflects that she worked for DKD Electric from April 8 through June 3, 1996, and left for "better employment." Prior to her work for DKD, she worked for another employer from November 1, 1995 through February 28, 1996, and left because of a "reduction in force." Lloyd Beebe's application reflects that he worked at DKD from April through May 1996 and left for "better employment." He worked for another employer in the previous 2 months and left because of a reduction in force and worked for another employer from June 1995 through February 1996 that he left because of a reduction in force. The applications state that they earned $18.70 per hour at DKD Electric.

we are not persuaded that the Respondent has shown by a preponderance of the evidence that, because of those understandable questions, it would not have hired the Beebes even if it were not motivated in part by union animus. What is decisive in our view is that Boydston never raised any of those obvious questions with the Beebes themselves. We are convinced that Boydston did not do so because he did not want to risk having his questions satisfactorily answered by the two union applicants.

Take, for example, Boydston's questioning why the two parents brought their small child with them when they applied for the jobs. The reasons why serious applicants might nevertheless be accompanied by a child are numerous and self-evident—the babysitter's not showing up being the most likely. But Boydston never asked the Beebe's about the matter, much less suggested that he doubted their seriousness as applicants because of the presence of their child.

Similarly, notwithstanding his questioning why the Beebes would be willing to work for lower wages, he never posed that obvious question to them. Rita Beebe testified that she was willing to quit her former job and take a reduction in pay to work for the Respondent "[t]o help the Union organize." She added that "not driving two hours every morning, taking my son to the babysitter at four o'clock in the morning, that would have sounded pretty good to me." Boydston conceded at the hearing that an individual may leave a higher paying job for many legitimate reasons, including the desire to engage in union organizing. We find it reasonable to infer that Boydston never raised his questions about the Beebes' particular reasons for seeking lower paying jobs because he did not wish to hear the legitimate explanations they might offer.

Finally, in rejecting the judge's analysis of the record evidence bearing on the Respondent's *Wright Line* defense, we find it significant that Boydston testified that he wanted to hire the most qualified journeyman that he could. The Beebes' applications showed that they had both completed Joint Apprenticeship Training programs and had worked for recognized contractors. Nonetheless, shortly after rejecting the Beebes' applications, the Respondent hired Brooks and Whitney. There is no evidence that the Respondent had any knowledge of qualifications possessed by Brooks and Whitney comparable to those of the Beebes. The Respondent has not shown that Brooks or Whitney satisfied any of the Respondent's hiring criteria—including even a journeyman electrician's license. As far as the record shows, the Respondent asked Brooks and Whitney nothing in the hiring process, much less how much they had been making on their most recent jobs, how long they had worked on their previous jobs, or why they had left those jobs. Curiously, Boydston assertedly found all of those factors critical in his review and rejection of the Beebes' applications. Revealingly, however, and unlike the Beebes, neither Brooks nor Whitney showed any affiliation with or support for the Union. Our dissenting colleague, like the judge, is apparently willing to discount all of this evidence. In essence, he argues that the judge made an outcome-dispositive credibility resolution in favor of Boydston when she found that his "testimony regarding his puzzlement about the statements on the Beebes' applications was quite genuine and understandable." Boydston's "puzzlement," or his doubts about the Beebe's seriousness, even if genuine, do not overcome the overwhelming preponderance of the evidence, fully discussed above, which establishes that the Respondent failed and refused to hire the Beebes because of their affiliation with and support for the Union.

In sum, the record establishes that the Beebes met all of the Respondent's requirements for employment as journeymen electricians to fill the Respondent's advertised vacancies, but they appeared for their job interviews wearing union insignia, and they revealed their union affiliation in their applications. They were rejected. Instead, the Respondent hired seven other applicants within the next 2–1/2 weeks, four of them on the same day that it rejected the Beebes. Although the record is largely silent as to the professional qualifications of these seven new hires, they apparently had one thing in common with each other that clearly distinguished each of them from the Beebes—they gave no indication whether they were or had been affiliated with or supporters of the Union.

Thus, we find, as fully discussed above, and contrary to the judge, that the Respondent has failed to establish by a preponderance of the evidence that it would have rejected the Beebes' applications even in the absence of their demonstrated affiliation with and support for the Union. We find that General Counsel has thus established that the Respondent violated Section 8(a)(3) and (1) of the Act by discriminatorily failing and refusing to hire Lloyd and Rita Beebe because of that affiliation and support.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified and set forth in full below and orders that the Respondent, Boydston Electric, Inc., Albuquerque, New Mexico, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with termination for soliciting for the Union on nonworking time.

(b) Interrogating employees about their union or other protected activities.

(c) Creating the impression that it is engaged in surveillance of union or other protected activities by asking an employee whether he was going to follow in the foot-

steps of another employee who had engaged in union activities.

(d) Discouraging membership in the Union or any other labor organization by failing and refusing to immediately reinstate employees upon their unconditional offer to return to work after they have engaged in a strike to protest the Respondent's unfair labor practices.

(e) Refusing to hire job applicants because they are members of International Brotherhood of Electrical Workers, Local 611, AFL–CIO, or any other union.

(f) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act.

2. Take the following affirmative actions necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer full reinstatement to Dan Miano to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Miano, and within 3 days thereafter notify him in writing that this has been done and that the discharge will not be used against him in any way.

(c) Within 14 days from the date of this Order, offer full reinstatement to unfair labor practice strikers Shawn Garrett and Ray Garrett to their former jobs or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, displacing if necessary, any replacements hired since February 28, 1996. The Respondent shall also be required to make them whole for any loss of earnings and other benefits that they may have suffered by reason of the Respondent's refusal to reinstate them, from the date of their offer to return to work.

(d) Within 14 days from the date of this Order, remove from its files any reference to the refusal to reinstate Shawn and Ray Garrett, and within 3 days thereafter notify them in writing that this has been done and that it will not be used against him in any way.

(e) Within 14 days from the date of this Order, offer Lloyd Beebe and Rita Beebe employment to the same or substantially equivalent position for which they applied, without prejudice to any seniority or any other rights or privileges to which they would have been entitled in the absence of the Respondent's hiring discrimination.

(f) Make the above-named employees whole for any loss of earnings and other benefits suffered as a result of the discrimination against them. Such amounts shall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest to be computed as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

(g) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Albuquerque, New Mexico, copies of the attached notice marked "Appendix."[13] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 9, 1995.

(i) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER BRAME, dissenting in part.

I agree with my colleagues that the judge properly found that the Respondent lawfully suspended Dan Miano and lawfully discharged Vincent Sisneros. I also agree that the Respondent did not unlawfully interrogate employee Donald Martin, but only for the reasons set forth by the judge in section II,A of her decision. Contrary to my colleagues and in agreement with the judge, however, I would find that the Respondent did not unlawfully threaten and interrogate Miano through field foreman and superintendent Joe Jaramillo's conversation with him on September 19, 1995; that it did not unlawfully discharge Miano in violation of Section 8(a)(3) and (1); and that it did not unlawfully refuse to hire Lloyd and Rita Beebe in violation of Section 8(a)(3) and (1).[1] Further, contrary to the majority, I would remand this proceeding to the judge to apply the proper test to determine whether the employees engaged in an unfair labor

[13] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] I agree that the General Counsel's motion to amend the complaint to allege that the Respondent discriminatorily promulgated its no-distribution rule should be denied.

practice strike and whether the 8(a)(1) violations she found were the cause of the strike. Accordingly, I would not pass at this point on the lawfulness of the Respondent's refusal to reinstate striking employees Ray and Shawn Garrett upon their unconditional offer to return to work.

1. In Jaramillo's conversation with Miano, Jaramillo asked him shortly after he began passing out union authorization cards, why he was doing "this." Jaramillo noted that he used to be in the Union but that Miano was not doing himself or the other employees any good because the Respondent was nonunion, the job had been bid that way, and it was probably going to stay that way. Jaramillo told Miano that he would do everything he could to protect his men. Jaramillo and Miano were friends and had worked together on other jobs.

To determine whether a statement constitutes an impermissible threat, it must be viewed in light of the circumstances existing when spoken and not in a vacuum. *Shen Automotive Dealership Group*, 321 NLRB 586, 591 (1996), citing *TRW, Inc. v. NLRB*, 654 F.2d 307, 313 (5th Cir. 1981). The Board has dismissed 8(a)(1) allegations involving statements related to plant closure or job loss where the remarks were clearly labeled as the supervisor's own opinion[2] or occurred in casual, noncoercive circumstances.[3]

In the totality of the circumstances, in agreement with the judge, I find that a reasonable employee would not find Jaramillo's words to be threatening or coercive. Jaramillo's comments, made to a friend, did not reasonably convey a threat that the Respondent would take adverse action against Miano because of his union activity. The General Counsel also has not pointed to any warning of any adverse action contemplated by any other person on behalf of the Respondent against Miano. Rather, Jaramillo's comments were made in the context of his own personal experience with the Union and expressed his own personal opinion about the practical difficulties for employees seeking union representation where the job was nonunion and had been bid that way. As the court observed in *Graham Architectural Products v. NLRB*, 697 F.2d 534, 541 (3d Cir. 1983), the First Amendment and Section 8(c) of the Act permit "employers to communicate with their employees concerning an ongoing union organizing campaign." See also *Federal-Mogul Corp. v. NLRB*, 566 F.2d 1245, 1251 (5th Cir. 1978) (Sec. 8(c) guarantees the right of management to converse with employees). My colleague's finding that Jaramillo's remarks implied that Miano's union activity might harm Miano's interests in some way is based on sheer speculation.

My colleagues also find that Jaramillo's questioning of Miano during this conversation constituted unlawful interrogation. I disagree. The test for determining whether interrogations violate the Act is "whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177 (1984), affd. sub nom. *Hotel Restaurant Employees Union, Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The criteria include history of employer hostility, nature of information sought, identity of questioner, place and method of interrogation, and truthfulness of the reply. *Bourne v. NLRB*, 332 F.2d 47 (2d Cir. 1964).

Applying these principles, I find that the limited violations found by the judge[4] are insufficient to conclude that the Respondent has a history of union hostility. I also find that Jaramillo's one question to his friend (why was Miano doing "this," i.e., union activity) did not require a response and was rhetorical in nature.[5] I also find that the question was general and nonthreatening in nature. Moreover, Jaramillo was a frontline supervisor, Miano was an open union supporter, and the conversation took place in a common area at the workplace. Further, unlike my colleagues, I take into account the undisputed testimony concerning the friendly relationship between Jaramillo and Miano. See *Sunnyvale Medical Clinic,* 277 NLRB 1217 (1985) (lawful talk was "friendly" and "casual" and their relationship was "friendly"). Thus, I conclude that the question did not constitute unlawful interrogation.

2. I also agree with the judge that the Respondent did not discharge Miano, either directly or constructively, and therefore I find that the Respondent did not unlawfully discharge Miano in violation of Section 8(a)(3) and (1). I also find, in agreement with the judge, that the Respondent's answer admitting that it discharged Miano "on or about September 22" does not preclude this finding. As I conclude that the Respondent did not discharge Miano, I find it unnecessary to apply *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U. S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393, 399–403 (1983).

The facts are as follows. On September 20, the Respondent lawfully suspended Miano for distributing union flyers during working time. Following the suspension, at the request of Keith Boydston, the Respondent's

[2] E.g., *Virginia Mfg. Co.,* 310 NLRB 1261, 1269–1270 (1993), enfd. mem. 27 F.3d 565 (4th Cir. 1994), and *Standard Products Co.,* 281 NLRB 141, 151 (1986), enfd. in part 824 F.2d 291 (4th Cir. 1987).

[3] E.g., *Gem Urethane*, 284 NLRB 1349, 1361 (1987).

[4] The judge found that the Respondent violated Sec. 8(a)(1) by threatening an employee with termination for soliciting for the Union on nonworking time; by interrogating an employee as to whether he had signed an authorization card for the Union; and by creating the impression of surveillance by asking the employee whether he was going to follow in the footsteps of another employee who had engaged in union activities.

[5] The court in *Federal-Mogul Corp. v. NLRB*, supra, 566 F.2d at 1251, observed that no evidence was provided showing that the questioning was for the purpose of reprisals.

president, Project Manager Dave Akin reviewed Miano's application and, on September 22, asked Miano for whom he had worked while "self employed." Akin gave Miano the opportunity to correct his application by providing the names of the places and people, with telephone numbers, and told him not to return until he had provided that information.[6] However, Miano did not return. At the hearing, he admitted that he had falsified his application.[7]

To prove an element of a wrongful discharge, the General Counsel must show that "the words or action of the employer would logically lead a prudent person to believe his tenure had been terminated." *NLRB v. MDI Commercial Services*, 175 F.3d 621, 626 (8th Cir. 1999), quoting *NLRB v. Hale Mfg. Co*., 570 F.2d 705, 708 (8th Cir. 1978). I conclude that the Respondent's asking Miano to provide a complete and truthful application, without more, is insufficient to lead Miano to believe that he had been discharged.[8] As Miano did not put the Respondent to the test by returning with a truthful application, my colleagues' conclusion that the Respondent discharged Miano has no basis in the evidence. As a result, I conclude that Miano quit or abandoned his job.

Moreover, I do not agree with my colleagues that the Respondent's answer admitting that Miano was discharged on or about September 22 precludes this finding. As the judge found, the General Counsel and the Respondent fully litigated the facts and the circumstances concerning Miano's union activity and his departure. Thus, the General Counsel did not rely on the answer to its prejudice. Cf. *Academy of Art College*, 241 NLRB 454, 455 (1979), enfd. 620 F.2d 720 (9th Cir. 1980), cited by the majority, and *Kroger Co*., 211 NLRB 363 (1974) (parties did not offer evidence on a subject because they acted in reliance on the stipulation). Furthermore, the General Counsel provided evidence, through Miano's own testimony, that Akin asked him to provide more information about his "self employment" and gave him a blank application. In addition, the facts are not necessarily inconsistent with the Respondent's answer. The Respondent may have subsequently recorded Miano's quit or abandonment of his job as a "discharge" on September 22. Accordingly, I find that it would be fundamentally unfair to ignore the clear evidence showing that the Respondent gave Miano the opportunity to correct his application and return to work.[9]

3. "[A]n unfair labor practice strike is strike activity initiated in whole or in part in response to certain unfair labor practices committed by the employer." *Pirelli Cable Corp. v. NLRB*, 141 F.3d 503, 515 (4th Cir. 1998), denying enforcement in part of 323 NLRB 1009 (1997). I agree with the majority that the judge did not apply the proper test, under which a causal link must be established between the unfair labor practice and the onset of the strike. Id. at 517. The *Pirelli* court also cautioned that the Board "must be wary of self-serving rhetoric of sophisticated union officials and members inconsistent with the true factual context." Id. at 518 and cases cited therein. The determination of causation is a fact-intensive question appropriate for the judge to resolve. *California Acrylic Industries, Inc. v. NLRB*, 150 F.3d 1095, 1100 (9th Cir. 1998) (the proper inquiry is whether, in each case, the employees voted to strike at least in part because of the unfair labor practices, but the Board should not apply a "mechanical rule because it places form over substance" and "invites manipulation"). As a result, I would remand this issue to the judge to apply the proper test and determine whether the 8(a)(1) violations she found were the cause of the strike, and, therefore, whether the Respondent violated Section 8(a)(3) by refusing to reinstate the Garretts upon their offer to return.

4. Finally, I agree with the judge that the Respondent did not violate Section 8(a)(3) and (1) by not hiring Lloyd and Rita Beebe. On June 3, 1996, Lloyd and Rita Beebe submitted applications for employment. They wore union hats and they and their small son were wearing union t-shirts. The Respondent's president, Boydston, reviewed their completed applications. He did not hire them, although he hired other individuals at that time and during the month of June.

As Boydston explained at the hearing, their applications showed that they had left jobs with a "good" contractor at $18.70 an hour and that they were looking for better employment with the Respondent, even though Boydston was only offering $14 an hour. Consequently, the judge found that Boydston's puzzlement about the statements on the Beebes' applications was "quite genuine and understandable" and credited his explanation that he did not hire the Beebes because they did not appear to be serious about working for the Respondent. Thus, the judge accepted Boydston's testimony concerning his

[6] In cross-examination, Miano admitted that he had falsified his application by stating that he had been "self employed" when he had been employed by union contractors. Miano testified that he thought that it would hurt his chances of obtaining the job if the Respondent knew that he was with the Union.

[7] The record reflects that the Respondent had, in the past, asked other employees at the time of their applications to provide additional information.

[8] The Respondent's request was reasonable because an employer "has the right to demand that its employees be honest and truthful in every facet of their employment." *NLRB v. Mueller Brass Co*., 509 F.2d 704, 713 (5th Cir. 1975).

[9] I also find that the Respondent did not constructively discharge Miano. The Board found in *Crystal Princeton Refining Co*., 222 NLRB 1068 (1976), that the General Counsel must show that the burden imposed on the employee must cause, and be intended to cause, a change in his working conditions so difficult or unpleasant as to force him to resign and that the burden was imposed because of the employee's union activities. In this case, the Respondent did not impose a difficult or unpleasant burden, but simply required Miano to submit an accurate and truthful application.

nondiscriminatory reasons for not hiring the Beebes. I see no basis for overturning the judge's credibility resolution and finding, which is well supported by the facts.[10] Nor should the Board substitute its own hiring judgment for that of the Respondent. Cf. *NLRB v. GATX Logistics, Inc.*, 160 F.3d 353, 357 (7th Cir. 1998), enfg. 323 NLRB 328 (1997), and cases cited therein (Board did not improperly substitute its own business judgment or act as a "super-personnel" department).[11] Thus, assuming arguendo, without deciding, that the General Counsel met his initial burden to show Lloyd and Rita Beebes' union activity was a motivating factor in the Respondent's decision not to hire them, the Respondent established that it would have taken the same action notwithstanding their protected activity. *Wright Line*, supra.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid and protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees with termination for soliciting for the Union on nonworking time.

WE WILL NOT interrogate employees concerning their Union or other protected activities.

WE WILL NOT create the impression that we are engaged in surveillance of our employees' union or other protected activities by asking an employee whether he was going to follow in the footsteps of another employee who had engaged in union activities.

WE WILL NOT discourage membership in the International Brotherhood of Electrical Workers, Local 611, AFL–CIO, or any other labor organization by failing and refusing to immediately reinstate employees upon their unconditional offer to return to work after they have engaged in a strike to protest our unfair labor practices.

WE WILL NOT refuse to hire job applicants because they are members of the International Brotherhood of Electrical Workers, Local 611, AFL–CIO, or any other union.

WE WILL NOT in any like or similar manner, interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Dan Miano reinstatement to his former position, and make him whole, less any net interim earnings, with interest, for any loss of earnings and other benefits he may have suffered because of our unlawful discharge of him.

WE WILL offer Ray Garrett and Shawn Garrett reinstatement and make them whole for any loss of earnings and other benefits resulting from our refusal to reinstate them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Dan Miano and the refusal to reinstate Ray Garrett and Shawn Garrett, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the discharges and the refusal to reinstate will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's Order, offer Lloyd Beebe and Rita Beebe employment to the same or substantially equivalent positions for which they applied, without prejudice to their seniority rights or privileges to which they would have been entitled in the absence of our hiring discrimination, and make them whole for any loss of earnings and other benefits resulting from our refusal to hire them, less any net interim earnings, plus interest.

BOYDSTON ELECTRIC, INC.

Mitchell Rubin, Esq., for the General Counsel.
Wayne E. Bingham, Esq. (Crider, Calvert, & Bingham), of Albuquerque, New Mexico, for the Respondent.
Brian J. Condit, Assistant Business Manager, International Brotherhood of Electrical Workers, Local 611, AFL–CIO, for the Charging Party.

DECISION

STATEMENT OF THE CASE

MARY MILLER CRACRAFT, Administrative Law Judge. This case involves alleged interrogations, threats, prohibition of distribution of literature on nonworking time, retaliation, suspension, discharge, unfair labor practice strike, failure to reinstate unfair labor practice strikers, disparagement of supporters of International Brotherhood of Electrical Workers, Local 611, AFL–CIO (the Union), and failure to consider for hire due to union activities.[1]

[10] See *NLRB v. Castaways Management*, 870 F.2d 1539, 1542–1543 (11th Cir. 1989) (in assessing credibility, judge properly considered the consistency and straightforwardness of the testimony and whether it related to the "logical consistency" of the record).

[11] By arguing that Boydston should have quizzed the Beebes regarding his puzzlement, my colleagues misperceive the nature of the process and realities of the workplace. The Respondent does not bear the burden of resolving questions concerning an individual's application. Rather, if an applicant has a serious interest in a position, he or she should anticipate and address possible concerns raised by statements made in his or her application.

[1] The case was tried in Albuquerque, New Mexico, on January 21 to 24, May 21 to 24, and July 21 to 23, 1997. The charge in Case 28–CA–13447 was filed by the Union on December 5, 1995, amended on De-

All parties were afforded full opportunity to appear, to introduce relevant evidence, to examine and cross-examine witnesses, and to argue the merits of their respective positions. On the entire record, including my observation of the demeanor of the witnesses,[2] and after considering the briefs of counsel for the General Counsel, the Charging Party, and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Boydston Electric, Inc. (Respondent), a New Mexico corporation, is an electrical contractor with an office and place of business in Albuquerque, New Mexico. Respondent annually purchases and receives goods and materials valued in excess of $50,000 from enterprises located within the State of New Mexico, which enterprises, in turn, purchased and received the goods and materials in interstate commerce directly from points outside the State of New Mexico. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Respondent has performed nonunion commercial electrical construction work in the Albuquerque area for about 20 years. Keith Boydston, president, manages the operation generally, while Dave Akin is the project manager, and Joe Jaramillo serves as field foreman and superintendent. In late 1994 and early 1995, Respondent performed work at an Intel construction site in Albuquerque. Over a 2- to 3-month period, it lost 40 employees, all of whom quit to work for unionized contractors, thus suffering a severe personnel shortage. There is no dispute that this loss upset Respondent.

In May 1995[3] Respondent began electrical construction work at the Cottonwood Mall site. Employment applications were taken by Jaramillo or Akin at the job trailer or by Boydston at Respondent's office.

A. Alleged Interrogation of Martin

Overt union applicant, Donald W. Martin, completed an application for employment with Respondent on July 10 at the job trailer. Martin wore a union shirt, hat, and pencil clip: "I tried to be as obvious as possible." Martin listed IBEW as his current employer, "because I believe I work for the IBEW." Three IBEW representatives were listed as his references. Martin did not recall the name of the man who took his application. However, the physical description of this man fits that of Jaramillo. In any event, according to Martin, the man noticed that he was union and asked Martin how long he had been a union member. Jaramillo testified that he did not recall Martin and denied asking Martin how long he had been in the Union.

Interrogation is not, by itself, a per se violation of Section 8(a)(1). Interrogation is coercive if, under all the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide,* 309 NLRB 185, 187 (1993). Under this totality of circumstances approach, such factors as whether the interrogated employee is an open or active union supporter, the background of the interrogation, the nature of the information sought, the identity of the questioner, and the place and method of the interrogation are examined. *Sunnyvale Medical Clinic*, 277 NLRB 1217 (1985). It is unnecessary to resolve the credibility conflict between Martin and Jaramillo as neither the question nor the context in which it was asked suggest any element of coercion or interference. See *Rossmore House,* 269 NLRB 1176, 1177 (1984), enfd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB,* 760 F.2d 1006 (9th Cir. 1985). Martin was an open union supporter. It would have been difficult for anyone not to have noticed his union paraphernalia. In the totality of circumstances, if Jaramillo noticed Martin was a union member and asked how long he had been in the Union, such question was noncoercive. No other threat or promise of benefit was made in conjunction with the question. Accordingly, I find no violation.

B. Alleged Statement to Ray Garrett that Respondent Would not Hire Another Electrician if it Meant Hiring Union

Ray Garrett, a covert union applicant whose employment application carefully concealed any union affiliation, was hired by Respondent on August 21. He testified that about a week after he started work, he spoke with Jaramillo telling him that Respondent needed more men because the sheetrock contractor was installing walls faster than the electrical conduit was being installed by Respondent, thus covering up the area where the conduit was to be placed. Jaramillo agreed. Ray Garrett asked if Respondent had received applications and Jaramillo responded, according to Ray Garrett, that all the applicants were union and, "Boydston Electric wouldn't hire another man if they had to hire a union man." Jaramillo denied making this statement.

Jaramillo was an impressive witness. He was extremely articulate, forthright, thoughtful, and focused. On the other hand, I also found Ray Garrett's presentation to be highly believable if somewhat emphatic and over rehearsed. Under these circumstances, I find Jaramillo's denial more inherently believable than Ray Garrett's account. This finding is based in part on a comparison of the demeanor of the two witnesses and is also based on the lack of any foundation to indicate that Respondent's applicants were all union at the time of this conversation in late August. Assistant Business Manager Brian Condit stated that in months prior to July, he had sent in excess of 30 union members to apply for work with Respondent and openly display their union affiliation. However, there is no evidence to indicate that these were the only applications Respondent had received and, in any event, Respondent's practice was to keep applications for 30 days. Accordingly, the pre-July applications would no longer have been on file at the time of this conversation. Moreover, Jaramillo hired applicants whom he knew to be union members. Under these circumstances, I credit Jaramillo's denial and find no violation.

C. Alleged Interrogation of Ray Garrett

During a later conversation between Jaramillo and Ray Garrett, Garrett testified that Jaramillo said, "You're an old

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cember 6, 1995, and March 12, 1996, and complaint issued March 28, 1996. The charge in Case 28–CA–13806 was filed on July 10, 1996, and the complaint issued August 30, 1996. The charge in Case 28–CA–13860 was filed on August 15, 1996, and the complaint was issued November 6, 1996. On November 7, 1996, Case 28–CA–13860 was consolidated with Cases 28–CA–13447 and 28–CA–13806.

[2] Credibility resolutions have been made based upon a review of the entire record and the exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[3] All dates hereafter are in 1995 unless otherwise specified.

union man, aren't you?" Garrett denied that he was. Jaramillo denied asking this question. For the reasons noted above, I find the denial of Jaramillo the more credible of the two statements.

D. Alleged Interrogation of Stygar

In response to leading questions, Stygar, an uncooperative witness who said he could not remember his application conversation, testified that during that conversation with Dave Akin on September 14, Akin asked if Stygar was, "a standing union member or nonunion." Akin testified extensively about the application interview with Stygar stating that he reviewed Stygar's application, asked him about prior jobs, discussed Stygar's acquaintance with some of Respondent's employees, and discussed former employers of Stygar's with regard to knowing the same people at those locations. Akin recalled that he discussed the application with Jaramillo and Jaramillo told him he had worked with Stygar before and Stygar was a good electrician. Akin also recalled checking two references. Akin denied that he asked Stygar whether he was with the Union.

Akin was generally cooperative and straightforward in his demeanor. On the other hand, Stygar was a reluctant witness and, on the one hand disavowed his affidavit as perjured, while at the same time utilizing it to refresh his recollection on several occasions. Stygar was disenchanted with the Union and the salting program. He exhibited bitterness at joining the Union because he understood there would be a steady supply of job opportunities and a high benefit package. When these expectations were not fulfilled, he left the Union.

Moreover, Stygar's testimony regarding his conversation with Akin was phrased generally. When asked, "Do you recall if anything was said about union in this conversation," he responded, "That's said everywhere around this whole state, from every—not any contractor in town. They would like to know if you are a standing union member, or nonunion." When questioned further about who asked this question, Stygar responded that Akin asked it.

On balance, I find Akin's denial more credible based on a comparison of demeanors and recollections. I also find Akin's denial the more inherently plausible version of events. Akin and Stygar knew common personnel from various other jobs and Jaramillo told Akin to hire Stygar because Jaramillo had worked with him before. Given the references in which Akin had confidence, I find it implausible that he would have asked about union affiliation. Accordingly, this allegation is dismissed.

E. Events of September 19

1. Alleged threat of termination and prohibition of distribution of union literature

On September 19, Dan Miano, a covert union applicant who concealed his union affiliation when he applied for employment with Respondent, reported to work prior to the 7 a.m. starting time and began handing out union authorization cards to employees who were gathered in the parking lot. Miano wore a union shirt and cap. Miano gave a card to Foreman James Garcia who, according to Miano and other covert salts, Garrett, Martinez, and Stygar, told Miano he was fired. Miano responded that he was on his own time. Garcia denied that he told Miano he was fired. In any event, Garcia went into the job trailer and then came back to Miano telling him he had to speak with Akin before he went to work.

When Miano reported to the trailer, according to Miano, Akin told him not to pass out any union literature at all on the jobsite. Akin testified that he told Miano not to pass out union literature on the jobsite on company time.

I find that Garcia did threaten discharge of Miano for distributing union cards. Although I did not find Miano to be an especially impressive witness, when his testimony is combined with that of Ray Garrett, whom I found believable, and Martinez, and additionally confirmed by Stygar, who showed animosity toward the Union, I find it more plausible than not that Garcia made the threat. In addition, I note Garcia's relatively young age and his admission that he interrogated another employee and from this I infer a lack of sophistication in labor relations matters. According to Miano, when Garcia told him he was fired, Miano replied that he was on his own time. Garcia also recalled that Miano mentioned that he was on his own time at some point during the conversation. According to Stygar, when Garcia told Miano that he was fired, Miano, "just stood around laughing, giggling, and having a good old time, and said he wasn't going nowhere. He had no write [sic] to fire him."

As to the alleged prohibition of distribution of union literature, I note that Miano was less than candid in some respects. For instance, when he testified regarding a conversation he had with Condit prior to applying at Respondent, Miano stated that he asked Condit if there was anywhere he might be able to go to work. According to Miano, Condit told him he could fill out an application at Cottonwood Mall and let Condit know if he got hired. This was the full extent of Miano's conversation with Condit. However, I find it implausible that something more was not stated with regard to the salting program or, at a minimum, about filling out the application in either an overt manner or a covert manner to conceal any relationship to the Union. Accordingly, based upon their relative demeanors and inherent probability, I resolve the credibility conflict between Akin and Miano by finding that Akin did tell Miano not to distribute union literature on company time but did not, as alleged, prohibit Miano from distributing union literature during nonworking time.

2. Alleged interrogation of Miano and threat of loss of jobs

Jaramillo and Miano had worked on other jobs together and had become friends. In fact, Jaramillo was with Miano when he was injured on another job and helped carry him out to receive medical attention. Jaramillo recommended Miano to Akin and told Akin to do everything he could to hire Miano because he was a hard worker. In any event, according to Miano, shortly after Miano began passing out union authorization cards, Jaramillo spoke to him asking him why he was passing out the cards. Jaramillo told Miano that he used to be in the Union but Miano was not doing himself or the other employees any good because Respondent was non union, that was the way the job had been bid, and it was probably going to stay that way. According to Miano, Jaramillo added that if the job went union, the employees would lose their jobs due to a contract clause which stated that the job could not become union for 1 year. Jaramillo concluded that he would do everything he could to protect his men and Miano said he had to take care of himself.

Jaramillo agreed that he spoke with Miano and asked why he was doing "this," telling Miano that he was not doing himself or the other employees any good and that Respondent was non union, that was the way the job was bid, and it would probably stay that way. Jaramillo also agreed that he told Miano he

would do everything he could to protect his men. Jaramillo specifically denied telling Miano that if the job went union, the employees would lose their jobs. Based upon their relative demeanors, as fully explicated above, I credit Jaramillo's denial.

Jaramillo explained that when he asked Miano, why are you doing "this," he meant why are you not working at full effort. Jaramillo thought Miano was preoccupied by something else. However, Jaramillo did not explain this to Miano and I find that in the context of the conversation, a reasonable person would have understood that by "this," Jaramillo was referring to Miano's activity on behalf of the Union. Accordingly, I find that Jaramillo asked Miano about his motives for engaging in union activity. Miano was an open union advocate at the time Jaramillo asked the question. Jaramillo and Miano had known each other as friends for a number of years. Based on the totality of the circumstances, I find that neither the question nor the context in which it was asked suggest any element of coercion or interference. See *Sunnyvale Medical Clinic*, supra; *Rossmore House,* supra.

3. Alleged interrogation of Chavez and impression of surveillance

Garcia testified that on September 19, the day Miano passed out authorization cards, Garcia asked employee Larry Chavez if he had signed an authorization card. There is no evidence that Chavez was an open union adherent. I find this interrogation coercive. Ray Garrett overheard this same conversation and added that Garcia additionally told Chavez, "You're trying to walk in the same footsteps as Dan Miano, aren't you." Garcia denied this portion of the conversation. On balance, I find Ray Garrett's recollection more believable than Garcia's denial. As mentioned above, Ray Garrett was a highly believable witness while Garcia was more tentative. Accordingly, I find the interrogation and impression of surveillance as alleged.

4. Alleged threat of discharge

Union salt Shawn Garrett overheard a conversation on September 19 between Foremen Garcia and Luis Perez in which Garcia allegedly said there was nothing Respondent could do about Miano passing out union literature unless he was caught doing it during working time and, "some way or other, I'm going to catch him doing it even if he's not." Garcia denied making this statement. Perez also denied that Garcia made such a statement but Perez recalled a conversation several days later when Garcia reported that Miano was passing out a union leaflet on company time. Garcia told Perez he could not do anything about it.

Shawn Garrett impressed me only as a well-rehearsed witness. When asked questions which he had not previously heard, he became uncertain. He stated that, "there was a lot going on in his life," during the fall of 1995. He also did not provide an affidavit until January, long after his September 1995 employment with Respondent. On the other hand, Perez was a very direct, if somewhat cryptic, witness who impressed me as very reliable. I find Perez' recollection of the conversation to be more accurate and accordingly dismiss this complaint allegation.

5. Alleged threat regarding signing an authorization card

According to Shawn Garrett, Garcia approached him on September 19 and told him not to even think about signing an authorization card. Garcia denied this. As between Garcia and Shawn Garrett, I credit Garcia. This allegation is dismissed.

6. Alleged disparate enforcement of apparel code

Also according to Shawn Garrett, Garcia told employee Julio Chavez to remove a union sticker from his shirt. Garcia denied this. Company policy prohibits stickers or writing on hardhats only. As above, I credit Garcia's denial and dismiss this complaint allegation.

F. Suspension of Miano

On September 20, Miano distributed union flyers at the sign-in table during the first 5 minutes of working time. Garcia told Miano that the distribution was prohibited[4] and Miano responded that he did not care. Jaramillo told Miano to report to the job trailer. Upon reporting to the trailer, Akin suspended Miano for the day. On the following day, Stygar testified he placed a stack of cartoons at the sign-in table before he signed in. Shawn and Ray Garrett testified that this was after starting time and Stygar handed them the cartoon. Ray Garrett testified that Stygar handed out four to six cartoons and then laid six or seven of the cartoons on Garcia's desk. Stygar and Garcia denied that Stygar handed Garcia a cartoon.[5] Garcia stated that he did not know that Stygar had distributed the cartoon on working time although Garcia admitted that he had seen the cartoon. Stygar was not suspended. I credit Stygar and Garcia regarding the method and timing of the distribution and find that Garcia was unaware that the cartoon was distributed by Stygar and, in any event, that Stygar distributed the cartoons before he signed in.

In late August and September, two employees of Respondent sold burritos at the Cottonwood Mall site. According to some witnesses, this occurred after 7 a.m. at the sign-in table. According to other witnesses, this occurred before 7 a.m. in the parking area. In any event, I find that Respondent had no knowledge of burrito sales during working time. I specifically credit Boydston, Akin, Jaramillo, Garcia, and Perez based on their relative demeanors when they testified that they were unaware that burritos were sold during working time.

In *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.,* 462 U.S. 393, 399–403 (1983), the Board articulated the allocation and order of proof in cases involving 8(a)(1) or (3) violations which turn

[4] Although Garcia was not present when Akin told Miano that he could not distribute during working time, Garcia said he was aware that Akin had told Miano about the prohibition of distribution during working time.

[5] Ray Garrett's testimony is somewhat confusing on the issue of whether Stygar actually handed a cartoon to Garcia. Ray Garrett was asked, "To who, if anybody, did you see him pass out this flier to?" He responded, "Uh—he passed it out to James Garcia and Vernon Tye, because they rolled up in the truck, after he had passed them out to us." The next question, "What was James Garcia's response?" was answered, "He didn't say anything to Randy [Stygar]." Finally, "About how many fliers did you see Randy [Stygar] pass out by the [sign-in] table that morning?" was answered, "Six or seven, probably maybe a half a dozen he laid on James Garcia's desk." On cross-examination, Ray Garrett stated, "No, Randy handed it right straight to me, and right straight to Sean and two or three, four other guys, and then there was a stack on the desk, too." I find, based on the totality of this testimony, that Ray Garrett's testimony is best understood as stating that Stygar placed a stack of cartoons on Garcia's desk rather than handed a cartoon directly to Garcia.

on employer motivation as follows: First, the General Counsel must make a prima facie showing sufficient to support an inference that protected activity was a motivating factor in the employer's decision. Upon making such a showing, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected activity.

In *Manno Electric,* 321 NLRB 278, 280 fn. 12 (1996), the Board stated that it had traditionally described the General Counsel's burden as that of establishing a prima facie case. Noting, however, that in *Southwest Merchandising Corp. v. NLRB,* 53 F.3d 1334, 1340 fn. 8 (D.C. Cir. 1995), the court suggested that the General Counsel's burden might be more appropriately described as a burden of persuasion, the Board concluded that the change did not represent a substantive change in *Wright Line* and restated that test as follows: "the General Counsel [must first] persuade that antiunion sentiment was a substantial or motivating factor in the challenged employer decision. The burden of persuasion then shifts to the employer to prove its affirmative defense that it would have taken the same action even if the employees had not engaged in protected activity."

I find that there is evidence of activity, knowledge, animus, and timing and hence the General Counsel has established that union activity was a motivating factor in Miano's suspension. I find, however, that Respondent would have suspended Miano in any event because he openly violated its rule[6] and told Respondent that he did not care.

G. Alleged Interrogation Regarding Union Affiliation of Applicant

According to Stygar, on September 20, Jaramillo asked him about an applicant, William Kirby, with whom Stygar had previously worked. Jaramillo asked whether Kirby was union or nonunion and Stygar replied that Kirby was nonunion. Jaramillo denied this and I credit him based upon the relative demeanor of Stygar and Jaramillo fully articulated above.

H. Alleged Solicitation of Ray Garrett to Rrequest that Miano Refrain from Union Activities

According to Ray Garrett, Jaramillo approached him early on September 21 and asked him to talk to Miano and tell him to quit passing out union material on the job. Jaramillo denied this. I credit Jaramillo's denial based on the relative demeanor credibility resolutions of Ray Garrett and Jaramillo as set forth above.

I. Discharge of Miano

Following the suspension of Miano, Boydston instructed Akin to examine Miano's application. Akin noticed that the application listed "self employed" for prior employment. On September 22, Akin asked Miano where he had worked when he was self employed. Miano answered that he had done "side jobs" for various people. Akin asked for the places, people, and phone numbers and told Miano he could not come back to work until he provided the information. Miano did not provide the information. There is no dispute that one of the reasons Miano's application was examined was his distribution of union literature. However, although I find that the motivation for examination of the application was unlawful, I do not find that Miano was discharged. Both Miano and Akin agree that Miano asked to take the application home in order to provide names and address. Other employees had been similarly requested to provide additional information, although in these instances, they were asked to supply information at the time of their application. In any event, Miano never returned. I do not find that a reasonable person would have determined that he was discharged under these circumstances.[7]

J. Alleged Statement that Miano was Taken off the Job Because of Union Activity and Alleged Interrogation

At about 3 p.m. on September 22, Boydston addressed the employees. He told them they could wear union stickers as long as they were not on the hardhats. He told them they could not distribute union literature on working time. According to Martinez and Stygar, in response to a question from Martinez, either Jaramillo or Akin said that Miano was run off because he lied on his application and for his union activities. Both Jaramillo and Akin denied such a statement and I credit their denials. Stygar asked about selling burritos on company time and Boydston said he was unaware of such a practice but would put a stop to it.

According to Martinez, immediately after the meeting, he overheard a conversation between Akin, Jaramillo, and Stygar in which Akin asked Stygar who was selling burritos. Stygar responded that Akin should ask his foremen. Jaramillo asked Stygar if he was union. Stygar answered, no. Jaramillo asked Stygar why Stygar asked so many questions during the meeting and Stygar responded that he always said what was on his mind. Stygar recalled that Jaramillo asked him if he was union or nonunion because Stygar had, "asked a lot of funny questions." Jaramillo denied interrogating Stygar. Generally, I was unimpressed with Martinez' recollection of the facts. Stygar, as mentioned before, was an erratic, uncooperative witness. I credit Jaramillo's denial of the interrogation.

K. Alleged Unfair Labor Practice Strike

Later on September 22 Miano, Shawn and Ray Garrett, Chavez, and Martinez met with Condit at the union hall and discussed the various unfair labor practices which they felt had occurred including interrogations, threats, selective enforcement of solicitation rules, and the discharge of Miano. The employees also attended COMET[8] training and voted to engage in an unfair labor practice strike of Respondent on Monday, September 25.

At about 8 a.m. on Monday, September 25, Miano walked onto the job and started yelling, "Electricians on strike." Shawn and Ray Garrett, Chavez, Stygar, and Martinez joined him. They marched around the job for 15 to 20 minutes yelling that they were on strike because of unfair labor practices. Shawn Garrett videoed the strike. The employees returned to the union hall, watched the video, and signed a letter to Respondent stating that they were on strike due to unfair labor practices.

[6] There is no allegation that the rule was discriminatorily promulgated.

[7] Respondent admitted in its answer that Miano was discharged on or about September 22, 1995. Where, as here, all parties agree on the words that were utilized during the conversation between Akin and Miano and the matter was fully litigated despite the answer to the complaint, I find that it would be unjust to find discharge based on the answer when the evidence is to the contrary.

[8] "COMET" is the acronym for Construction Organizing Membership Education Training.

I have found only three unfair labor practices. In one instance, I have found that Garcia threatened discharge of Miano for distributing union literature before work. Miano told Garcia he was on his own time. Akin told Miano he could not distribute union literature during working time. No action was taken against Miano on that date and, in fact, according to Stygar, Miano did not take Garcia's threat seriously. Later Boydston told all assembled employees that they could not distribute literature on working time or place union insignia on hardhats. Accordingly, prior to voting on whether to strike, all employees knew that the prohibition against distribution of union literature applied only to working time.[9] In the other instance, Garcia asked Larry Chavez if he signed a union authorization card and whether he was walking in Miano's shoes. There is no evidence that this isolated remark was specifically discussed at the strike vote meeting. These unfair labor practices are neither flagrant or of a serious, pervasive nature. Accordingly, I do not find that the strike was an unfair labor practice strike. See, e.g., *Citizens Bank of Willmar,* 245 NLRB 389, 391 (1979).

L. Alleged Interrogation of Mark Vilegas

On September 26 Vilegas completed an application for employment with Respondent listing union apprenticeship training, four union contractors as past employers, and business agents as references, utilizing the union's address. According to Vilegas, Jaramillo asked him if all the contractors he listed were union and Vilegas responded, yes. Jaramillo denied that he interrogated Vilegas. As mentioned before, Jaramillo was a highly credible witness. Although Vilegas was also a somewhat impressive witness, showing thoughtfulness in his answers, as between the two witnesses, I credit Jaramillo. Accordingly, this allegation is dismissed.

M. Alleged Failure to Reinstate Unfair Labor Practice Strikers

On February 28, 1996,[10] Ray and Shawn Garrett unconditionally offered to return to work immediately. Akin told them that Respondent did not need any electricians at that time. He advised them to check back from time to time to see if Respondent needed anyone. I have found that no unfair labor practice strike occurred. Accordingly, the Garretts' reinstatement rights are those of economic strikers. The issues of whether the strike had been abandoned and whether the Garretts had been permanently replaced were not litigated. Therefore, this issue is left to compliance.

N. Alleged Interrogation of Dave Ramirez

In his posthearing brief, counsel for the General Counsel moved to amend the complaint to allege that on May 30, either Jaramillo or Akin interrogated applicant Ramirez regarding his union affiliation. The new allegation is closely connected to the subject matter contained in the complaint. Respondent did not cross examine Ramirez regarding this unalleged interrogation. However, it did question Akin regarding whether he took Ramirez' application. Akin said he did not take Ramirez' application but he thought Jaramillo had. Jaramillo was never asked about the interrogation which Ramirez attributed either to him or Akin. Finally, Respondent did not discuss this issue in its posthearing brief assumably because it was unaware that counsel for the General Counsel would seek to amend the complaint in its posthearing brief. Under these circumstances, I do not find that this matter was fully litigated. See, e.g., *Consolidated Printers,* 305 NLRB 1061, 1063–1064 (1992); *Femco Machine Co.,* 238 NLRB 816, 818 (1978). Accordingly, this amendment is not allowed.

O. Alleged Failure to Hire Lloyd Beebe or Rita Solano-Beebe

On June 1 and 2, Respondent advertised for journeymen electricians. On June 3, Rita and Lloyd Beebe completed applications for employment with Respondent. Both wore union hats and shirts. Their small son accompanied them and also wore union insignia. The Beebes completed applications indicating graduation from Joint Apprenticeship Training, prior work with union contractors, and union business agents as references. Neither was hired. Covert union salts Sisneros and Moran were at Respondent's office at the same time as the Beebes. They did not wear union insignia and carefully concealed their union affiliation on their applications. They and covert union salts, Beel and Romero, were hired on June 3. Beel and Romero did not indicate any potential union affiliation on their applications. Respondent hired three additional employees in June. None of their applications indicated any union affiliation.

Boydston testified that he reviewed the Beebes applications. He was aware that they listed Condit as their reference that their past employment had been at union scale, $18.70 per hour, and that they were currently unemployed. Their applications stated that they were seeking better employment. He testified that he did not hire them because,

> Well, they was working for DKD making $18.70 an hour, working for them for one month, and looking for better employment. I don't think I felt, that I'd fill that criteria for them. I didn't think they was real serious about coming to work for me as a good employee, employees.

When asked why he felt they were not serious, he responded,

> Bringing their child to work with them. They said they were looking for better employment and they quit a job at $18.70 an hour there's a good contractor—a good union contractor—why would they want to come to work for me at $14 an hour?

Utilizing the *Wright Line* framework, I find that there is ample proof of union affiliation, knowledge of the affiliation, and some degree of animus toward the Union due to their prior tactics. However, I also note that Respondent had hired known union supporters in the past. Boydston's testimony regarding his puzzlement about the statements on the Beebes' applications was quite genuine and understandable. Without more information, it is nonsensical to leave a higher paying employer

[9] Garcia's unlawful threat of discharge was not "effectively repudiated" pursuant to *Passavant Memorial Hospital,* 237 NLRB 138, 138–139 (1978) (effective repudiation requires that it be timely, unambiguous, specific to the coercive conduct, free from other unfair labor practices, adequately published to all employees, and set forth assurances that no further interference with Sec. 7 rights will occur); see also, *Gaines Electric Co.,* 309 NLRB 1077, 1081 (1992). However, under all the circumstances, I find that employees understood that they could distribute union literature on nonworking time. See, e.g., *Mohawk Liquer Co.,* 300 NLRB 1075 fn.1 and 1086 (1990) (failure to fully remedy pursuant to *Passavant* did not prolong strike); Cf. *Filene's Basement Store,* 299 NLRB 183, 209 (1990) (after vice president interfered with employee's distribution of union literature, no effort was made by company to clarify action to employees and fact that employee knew he was acting within the long-posted solicitation and distribution rules irrelevant).

[10] All dates hereafter are in 1996 unless otherwise specified.

for better employment and consider lower pay to be that better employment. Under these circumstances, I find that the Beebes would not have been hired even if their union affiliation had not been known.

P. Alleged June 3 Interrogation of Beel

Beel testified that as he left Respondent's office on June 3, Boydston met him and asked him whether one of his past employers was a union company. Beel said it was not. Beel was told to report to work the next day. Boydston denied asking Beel about the past employer. He stated he would never have asked such a question because he knew that particular employer was nonunion. This interrogation was not set forth in the complaint. Counsel for the General Counsel seeks to add it by motion in his posttrial brief. I find in this case that the matter is closely related to other allegations in the complaint and it was fully litigated in that Respondent cross-examined Beel and questioned Boydston about the interrogation. I further find that as between Beel and Boydston, Boydston was the more credible witness. Boydston was careful and thoughtful in his responses and maintained this demeanor throughout several days of examination by counsel for the General Counsel pursuant to Rule 611(c). Boydston also already knew the nonunion status of Beel's prior employer and therefore would have had no reason to question an applicant for employment about that fact. Accordingly, this allegation is dismissed.

Q. Alleged June 4 Interrogation of Sisneros and Moran

Moran and Sisneros worked for Respondent in 1994 at the Intel job. Akin, Jaramillo, Perez, and Garcia were supervisors on that job and knew that Moran and Sisneros had gone to work for union contractors at the Intel site after working for Respondent. According to Sisneros, on his first day of work, Akin asked Moran if he was still in the Union and why he was looking for a job at a nonunion shop. Akin denied that he interrogated Moran. When foreman Perez entered the room, he recognized Moran and Sisneros and, according to Sisneros, asked if they were still in the Union. Perez denied this. Moran and Sisneros were initially assigned to Garcia's crew. According to Sisneros, Garcia asked them whether they were happy with the Union.

These interrogations were not alleged. In his posttrial brief, counsel for the General Counsel seeks to amend the consolidated complaint to add these further allegations. The interrogations are closely related to allegations contained in the complaint and these matters were fully litigated in that Respondent cross-examined the General Counsel's witnesses and questioned its own witnesses regarding the interrogations.

Turning to the merits of the allegations, in each instance I do not credit Sisneros over Respondent's witnesses. Based on their relative demeanors, I find that the denials of Akin, Jaramillo, Perez, and Garcia are the more credible. Accordingly, although the amendment is allowed, this allegation is dismissed.

R. Alleged Disparagement of Union Supporters and Unspecified Threat of Reprisals by Garcia

Ramirez and Sisneros were assigned to move a lift on June 8. While taking a rest stop, Ramirez and Sisneros testified they were hit by wet sunflower seeds and looked up to see Perez and Garcia a level above them. It was extremely noisy at that time. Perez told the men to get back to work. Beel overheard Garcia and Perez a short time later. According to Beel, Garcia said that, "[t]he Union's no good bastard . . . and that they hated them all, and that they didn't work and they were too slow." Perez responded, "Yes," and they walked away from Beel's position.

According to Perez and Garcia, Perez threw dry sunflower seeds at Ramirez and Sisneros and told them to get back to work. The reason he threw the sunflower seeds was to get their attention because he tried yelling to them and they could not hear him. Both Perez and Garcia denied that either of them spit and both denied stating that they hated the Union.

I credit Perez' and Garcia's denial over the testimony of Ramirez and Sisneros based upon the relative demeanors of these witnesses.

S. Alleged Unlawful Discharge of Sisneros

On June 4, his first day of work for Respondent, Sisneros was assigned to work for Foreman Garcia. Garcia recalled speaking to Sisneros on the first day he worked on Garcia's crew and told him to speed up—that he was going a little too slowly. The next day, Garcia recalled speaking to Sisneros in the morning, asking him to work a little faster, and in the afternoon, Garcia recalled telling Sisneros that the apprentices were hanging more fixtures than he was. On June 5, according to both Jaramillo and Garcia, Garcia complained to Jaramillo about Sisneros' production. Jaramillo spoke with Sisneros that day and asked him why he was not working. According to Jaramillo, Sisneros said that he needed to read the prints and get material. Sisneros assured Jaramillo that he would buckle down and get the work done. According to Jaramillo, this did not occur and, thinking there might be a personality conflict between Sisneros and Garcia, on June 8, Sisneros was assigned by Jaramillo to Perez' crew.

Perez testified that he spoke with Sisneros on four occasions warning him about his slow performance. According to Perez, Sisneros wasted time, failed to get supplies prior to beginning a task, and failed to complete work in a timely manner, sometimes taking twice as long at an assignment as Perez anticipated. Jaramillo received the same complaints from Perez that he had received from Garcia and once again spoke to Sisneros who told Jaramillo that Perez was out to get him. Jaramillo told Sisneros to do what he could. Then Jaramillo asked another foreman, Vernon Tye, to take Sisneros. Tye refused. Sisneros was discharged by Jaramillo on June 12. The reason for discharge was lack of production.

Respondent's foremen acknowledged that other employees wasted time and did not work as fast as expected on occasion. However, whenever they were told to get back to work or speed up, these employees complied. [11]

There is no dispute that Respondent had knowledge that Sisneros was a union member. There is evidence of animus toward the Union. Accordingly, I draw an inference that Sisneros' union membership was a motivating factor in Respondent's decision to discharge him. However, I find nevertheless that Respondent would have discharged Sisneros in the absence of his union membership. The credited evidence indicates that Sisneros did not work up to speed and was repeatedly warned

[11] General Counsel also relies upon the alleged horseplay of two foremen in arguing that Sisneros was treated disparately by Respondent. The foremen denied the horseplay. I credit the denials of the foremen regarding these incidents.

that he needed to speed up. He did not change his progress. Accordingly, I find that his discharge did not violate the Act.

CONCLUSIONS OF LAW

By threatening an employee with termination for soliciting for the Union on nonworking time and by interrogating an employee as to whether he had signed an authorization card for the Union and whether he was going to follow in the footsteps of another employee who had engaged in activities in behalf of the Union, Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

[Recommended Order omitted from publication.]